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PROFESSIONAL LIABILITY/MEDICAL MALPRACTICE

** THE FEDERAL GOVERNMENT PAYS APPROXIMATELY 40% OF ALL HEALTH CARE COSTS. AS A NATION, WE PAID $355.4 BILLION LAST YEAR ON HEALTH CARE, OR 10.8% OF THE GNP. THIS IS ONCE AGAIN, THE HIGHEST IN OUR HISTORY.

** ACCORDING TO THE NEW YORK TIMES, DEFENSIVE MEDICINE HAS BEEN ESTIMATED TO INCREASE MEDICAL COSTS BY 30%. THE AMA ESTIMATES THAT DEFENSIVE MEDICINE ADDS $15 TO $40 BILLION ANNUALLY, OR BETWEEN 25% AND 50% OF THE TOTAL COST OF TREATMENT.

** THE AMOUNT OF MEDICAL MALPRACTICE CLAIMS ACTUALLY PAID OUT INCREASED SEVENFOLD TO $1.4 BILLION, BETWEEN 1975 AND 1984. PRESENTLY, THE ANNUAL COST IS $2+ BILLION. IN 1982, AT LEAST 250 SETTLEMENTS EXCEEDED $1 MILLION; A TENFOLD INCREASE IN ONLY 4 YEARS. THE AVERAGE CLAIM VERDICT IS $338,463; BY CONTRAST IN 1975 IT WAS $48,500.

** YET, PERHAPS ONE-THIRD OF ALL SUITS MAY BE UNFOUNDED; THE NEW YORK TIMES, IN AN EDITORIAL, SUGGESTED THESE ARE STIMULATED BY THE "MALPRACTICE LOTTERY".

75% OF ALL CLAIMS ARE CLOSED WITH NO INDEMNITY AND THE DEFENDANTS PREVAIL IN 70% OF ALL CASES CARRIED THROUGH TO TRIAL. IN THE MID-70S I MET WITH A REPRESENTATIVE OF THE SEVEN MAJOR NEW YORK CITY NEUROSURGEONS WHO HAD COLLECTIVELY BEEN SUED 25 TIMES AND WHO HAD $67 MILLION IN POTENTIAL JUDGMENTS PENDING AGAINST THEM.

** BETWEEN 1970 AND 1982, MALPRACTICE PREMIUMS FOR ALL PHYSICIANS INCREASED BY 434%. THIS PREMIUM ACCOUNTED FOR APPROXIMATELY 3.5% OF PHYSICIANS' GROSS INCOME IN 1982. NEW YORK MAY ALLOW ONE COMPANY TO RAISE ANNUAL PREMIUMS BY 52% NEXT YEAR.

INSURANCE PREMIUMS WENT UP 400% IN SOME STATES OVER THE PAST FIVE YEARS.

** MALPRACTICE CLAIMS HAVE TRIPLED IN THE LAST DECADE. ONE OUT OF 20 DOCTORS WERE SUED IN 1975; IN 1983 THE FIGURE WAS ONE OUT OF EVERY 6 DOCTORS, OR 16 SUITS FOR EVERY 100 PHYSICIANS. THIS WAS 20% MORE THAN THE PREVIOUS YEAR, AND 300% MORE THAN IN 1975 -- THE YEAR THAT WE HAD THE FIRST MALPRACTICE CRISIS. THE MOST RECENT AMA FIGURE IS THAT ONE OUT OF EVERY 5 PHYSICIANS WILL BE SUED.

** THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS REPORTED THAT 81% OF THEIR MEMBERS HAD RAISED THEIR FEES IN 1985, AND 16% HAD GIVEN UP DELIVERING BABIES BECAUSE THEIR MALPRACTICE PREMIUMS HAD MORE THAN DOUBLED SINCE 1981. OBSTETRICS HAVE PREMIUMS AS HIGH AS $80,000 A YEAR. MORE THAN 70% OF OB-GYN PRACTITIONERS WIN THEIR CASE, BUT STILL THE COST TO DEFEND AVERAGES $19,700 PER CLAIM. IF A BABY IS INVOLVED, IN SOME STATES SUIT CAN STILL BE FILED UNTIL THE CHILD REACHES THE AGE OF 18. AT THE CURRENT RATE, OB-GYN SPEND 90% OF THEIR GROSS INCOME DURING THEIR FIRST YEAR FOR MALPRACTICE INSURANCE.

** CERTIFIED NURSE-MIDWIVES -- ALL REPORTS ARE THAT THEY PROVIDE EXCELLENT CARE. YET, THEY MAY BE FORCED OUT OF THE HOSPITALS AND BIRTHING CENTERS IN WHICH THEY PROVIDE CARE. THERE ARE 2,800 NURSE-MIDWIVES NATIONWIDE. THEY ASSIST IN 2% OF THE NATION'S ANNUAL BIRTHS, THEIR ANNUAL SALARIES ARE 1/5TH OF THAT OF PHYSICIANS ($25,000 PER YEAR VS. $110,000 FOR OBSTETRICIANS). THEIR RATE OF MALPRACTICE SUITS IS LOW, WITH ONLY 6% HAVING BEEN SUED SINCE 1974 VS. 60% OF OBSTETRICIANS HAVING BEEN SUED AT LEAST ONCE, AND 20% SUED THREE OR MORE TIMES.

YET, THERE IS A CRISIS IN THAT NO COVERAGE IS AVAILABLE, EVEN AT HIGH RATES. ONE NURSE-MIDWIFE WHO HAS BEEN IN PRACTICE FOR 10 YEARS HAS NEVER BEEN SUED, EVEN AFTER 600 DELIVERIES. FOUR YEARS AGO HER PREMIUMS WERE $125; TWO YEARS AGO THIS DOUBLED TO $250; LAST YEAR IT WAS $800, BUT NOW NONE IS AVAILABLE.

** ON MOLOKAI, THE SCHOOL OF MEDICINE PROVIDES THE OB-GYN COVERAGE; THE FOUR LOCAL PHYSICIANS GAVE UP OBSTETRICS IN JANUARY WHEN THEY LEARNED THAT THEIR PREMIUM WOULD BE $24,000 PER YEAR. THERE HAVE BEEN 80 PREGNANCIES ON MOLOKAI THIS YEAR.

THE EXPECTANT MOTHERS HAVE TO TRAVEL TO OAHU FOR THE ACTUAL DELIVERY.

OFTENTIMES ONE'S PERCEPTION IS JUST AS IMPORTANT, AND MAYBE EVEN MORE IMPORTANT THAN REALITY. IF MY MAIL BAG IS ANY INDICATION, I BELIEVE THAT THERE IS DEVELOPING WITHIN THIS COUNTRY A VERY NEGATIVE STEREOTYPE OF A TRIAL LAWYER. IN MY YOUTHFUL DAYS, WE SOMEWHAT LAUGHINGLY MIGHT HAVE USED THE PHRASE "THOSE AMBULANCE CHASERS", BUT TODAY A FEW OTHER MORE COLORFUL DESCRIPTIONS HAVE BEEN ADDED, SUCH AS "BLOOD SUCKERS" AND "UNETHICAL".

AS A LAWYER, I, LIKE ALL OF YOU, BELIEVE IN THE FUNDAMENTAL RIGHT OF ANY INJURED PARTY TO SEEK RESTITUTION FOR HARM OR DAMAGES INFLICTED UPON ONE BY A NEGLIGENT PARTY. HOWEVER, RECENT ACCOUNTS IN THE NEWS MEDIA, AND IN NATIONAL WEEKLY MAGAZINES, SUGGEST THAT MORE CLAIMS AND SIGNED PETITIONS WERE FILED BY AMERICAN LAWYERS WHO CONVERGED UPON BHOPAL IMMEDIATELY AFTER THE DISASTER, THAN THERE WERE CITIZENS WHO LIVED THERE.

THESE NUMBERS CONJURE UP IN THE MINDS OF MANY THE PICTURE OF A "BLOOD SUCKING, UNETHICAL, AMBULANCE CHASING LAWYER".

THE CONGRESS OF THE UNITED STATES, LIKE ANY LEGISLATIVE BODY, REFLECTS TO SOME DEGREE THE VARIOUS ATTITUDES OF THE CONSTITUENTS OF THE MEMBERS. REACTION MAY BE SLOW IN DEVELOPING BUT HISTORY HAS SHOWN THAT WHEN REACTION BECOMES IRRESISTIBLE, THE RESULTS MAY BE LESS THAN DESIRED.

(CITE HIJACKING)

REACTION IS BEGINNING TO DEVELOP IN THE CONGRESS ON THE MATTER OF MEDICAL MALPRACTICE AND A NUMBER OF BILLS HAVE BEEN INTRODUCED. ONE, WHICH IS STILL IN DRAFT FORM BUT UNDOUBTEDLY WILL SOON BE INTRODUCED, HAS BEEN DEVELOPED UNDER THE AUSPICES OF THE AMERICAN MEDICAL ASSOCIATION.

BRIEFLY, I UNDERSTAND THAT THEIR PROPOSAL WOULD HAVE THE FEDERAL GOVERNMENT PROVIDE $100 MILLION TO THE STATES TO ENCOURAGE THE ENACTMENT OF STATE STATUTES WHICH WOULD: CAP "PAIN AND SUFFERING" AWARDS AT $250,000; ELIMINATE THE COLLATERAL SOURCE RULE; PROVIDE FOR PERIODIC PAYMENT OF AWARDS IN EXCESS OF $100,000; LIMIT ATTORNEY'S FEES; AND STRESS THE DEVELOPMENT OF MEDICAL PEER REVIEW ORGANIZATIONS. ANOTHER APPROACH WHICH IS BEING CONSIDERED WOULD ESTABLISH A "NO-FAULT" APPROACH UNDER THE MEDICARE AND MEDICAID PROGRAMS.

I HAVE, FOR A NUMBER OF YEARS NOW, SUBMITTED VARIOUS MEASURES HOPING TO DEVELOP SOME DIALOGUE ON THIS ISSUE. I HAVE PROPOSED, FOR EXAMPLE, THAT WE ESTABLISH A FEDERAL "NO-FAULT" PROGRAM, SIMILAR TO THE WORKERS' COMPENSATION PROGRAM. I HAVE ALSO PROPOSED THAT WE ENCOURAGE ARBITRATION AND THE USE OF INTERDISCIPLINARY PROFESSIONAL PANELS.

THE REACTION WHICH I HAVE RECEIVED TO DATE FROM THE TRIAL LAWYERS HAS BEEN, SIMPLY STATED, "OPPOSITION". MAY I, AS A FRIEND, NOW TELL YOU THAT THE TIME IS UPON US WHEN DOGGED OPPOSITION WILL NOT CARRY YOUR DAY, JUST AS THE AMA MADE A MISTAKE IN OPPOSING MEDICARE.

TODAY MEDICARE IS THE LAW OF THE LAND AND TOMORROW WE WILL HAVE A NATIONAL HEALTH PROGRAM. THIS IS A CERTAINTY AND I BELIEVE THE AMA HAS LEARNED THE LESSON THAT THE BEST WAY TO PROTECT THE INTERESTS OF ITS MEMBERS IS TO FULLY PARTICIPATE IN THE LEGISLATIVE PROCESS THAT WILL DEVELOP OUR NATIONAL HEALTH PROGRAM.

SIMILARLY, FOR YOUR ORGANIZATION, YOU SHOULD SET ASIDE THE STANCE OF TOTAL OPPOSITION AND SIT DOWN WITH YOUR FRIENDS IN CONGRESS AND STUDY THIS MATTER. BECAUSE IT IS A PROBLEM AND IT MUST BE RESOLVED. YOU SHOULD SUGGEST CONCRETE WAYS IN WHICH THE INCREASING COSTS OF OUR HEALTH DELIVERY CAN BE CONTROLLED;

HOW QUALITY CARE CAN BE PRESERVED AT REASONABLE COSTS. OTHERWISE, ONE DAY WE WILL WAKE UP AND FIND THAT LAWS HAVE BEEN ENACTED THAT WILL DRASTICALLY CURTAIL YOUR FEES, DRASTICALLY LIMIT UNDERLYING CAUSES OF ACTION, AND THE JURISDICTION OF THE COURTS.

I BRING THIS CHOICE TO YOU. I STAND READY TO MEET WITH REPRESENTATIVES OF YOUR ORGANIZATION, AS I HAVE ON OTHER OCCASIONS. AFTER LENGTHY DISCUSSIONS WITH MEMBERS OF YOUR ASSOCIATION I DECIDED THAT THE KASTEN PRODUCT LIABILITY BILL WAS NOT IN THE BEST INTEREST OF THE INJURED. I HAD BEEN PERSUADED. I AM OPEN-MINDED.

I BELIEVE THAT MOST MEMBERS OF CONGRESS ARE OPEN-MINDED. FURTHERMORE, I AM NOT CERTAIN THAT THE MEASURE WHICH I HAVE PROPOSED THIS SESSION OF CONGRESS WOULD, IN FACT, PROVIDE A SOLUTION TO OUR EVER-ESCALATING COSTS OF HEALTH CARE. BUT IT DOES PROVIDE A VEHICLE FOR ESTABLISHING ONGOING DIALOGUE.

DESCRIPTION OF S.175 -- THE HEALTH CARE PROTECTION ACT OF 1985

MY BILL WAS ESTABLISHED AFTER CONSULTATION WITH THE GOVERNORS OF THE 50 STATES, AND I HOPE WOULD BUILD UPON THE STRENGTH OF THE VARIOUS STATE SYSTEMS.

IT PROVIDES ECONOMIC INCENTIVES ($25 MILLION) TO ENCOURAGE STATES TO ENACT MODEL LEGISLATION WHICH WOULD:

** ENSURE THAT ALL MALPRACTICE ALLEGATIONS COME BEFORE INTERDISCIPLINARY PROFESSIONAL PANELS;

** PROVIDE THAT THE PANEL HAS THE NECESSARY AUTHORITY TO FULLY REVIEW THE CLAIMS; INCLUDING POWER TO CALL ITS OWN EXPERT WITNESSES, SUBPOENA AUTHORITY;

** PARTIES CAN REQUEST A SUBSEQUENT "DAY IN COURT"; HOWEVER, THE FINDINGS AND RATIONALE OF THE PANEL ARE TO BE SUBMITTED IN EVIDENCE AND THE REQUESTING PARTY MUST "SUBSTANTIALLY IMPROVE" HIS/HER POSITION, OR ELSE HE/SHE IS LIABLE FOR ALL COURT COSTS.

** ALL ALLEGATIONS AND FINDINGS ARE TO BE BROUGHT TO THE ATTENTION OF THE APPROPRIATE STATE LICENSING BOARD WHICH IS TO BE PROVIDED BROAD AUTHORITY TO APPROPRIATELY LIMIT THE PRACTITIONER'S SCOPE OF PRACTICE;

** ATTORNEY'S FEES ARE TO BE LIMITED TO 1/3 OF AWARDS LESS THAN $100,000 AND PROGRESSIVELY TO 15% OF THE AMOUNT IN EXCESS OF $300,000

** I DID NOT EXPRESSLY LIMIT THE AMOUNT THAT CAN BE AWARDED OVERALL, NOR DID I PROPOSE ANY EXPRESS LIMIT FOR "PAIN AND SUFFERING" -- I FELT THAT THE INTERDISCIPLINARY PANEL WOULD TAKE THESE ISSUES INTO ACCOUNT IN DETERMINING A FAIR JUDGMENT.

** UNDER MY PROPOSAL, I WOULD EXPECT THAT STATE AND LOCAL BAR ASSOCIATIONS WOULD TAKE THE LEAD IN DEVELOPING RESPONSIVE SOLUTIONS TO THE MEDICAL MALPRACTICE PROBLEM.

THE ALTERNATIVE FORCES THE FEDERAL GOVERNMENT, OR

AS SOME WOULD SAY "BIG BROTHER", TO ACT.